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Robin Collins
World Federalist Movement-Canada

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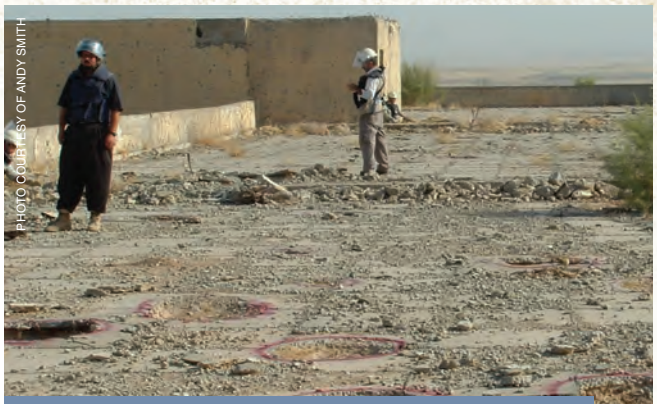
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The roof of a building after a BLU-97 strike in Iraq. Deminers are clearing unexploded munitions so the building can be used as a shopping centre.

The cluster munitions campaign, following the precedent of the International Campaign to Ban Landmines, is beginning to make an impact on state views of banning or restricting cluster munitions. This article examines the history behind the fight to ban or restrict cluster munitions and its ties to the ICBL. The author also discusses the most recent developments in the process to ban or restrict cluster bombs.

by Robin Collins [World Federalist Movement–Canada]

The end of the Cold War has a lot to do with the greater attention the world now gives to humanitarian grievances. Unexploded ordnance impact data has been accumulating, but without the precedent of the anti-personnel mine campaign and the Ottawa Convention,[1] the Belgians would probably never have considered banning cluster munitions in 2006.

Most of the ICBL's 1,400 members have limited themselves to APM eradication, victim assistance and other Convention goals, but have not yet rallied in similar numbers to the cluster-munitions effort. The Cluster Munition Coalition, formed in late 2003, has approximately 170 members. Many of the CMC's members and leadership, however, are seasoned campaigners. Familiar to ICBL-watchers are Handicap International, Human Rights Watch, Landmine Action (UK), Mines Action Canada and Pax Christi, who are among those sitting on CMC's 10-member steering committee.

The CCW

The ICBL and its dynamic partnership with like-minded APM ban states (the Ottawa Process) was an innovative and collaborative way of quickly moving the ban agenda forward. Disappointment with the existing Convention on Certain Conventional Weapons[2] consensus rule (where a single recalcitrant state can dilute or block Convention provisions supported by the majority) led to the new parallel process.

The parties to the Ottawa Process focused on the idea that humanitarian impact can trump military utility.[3] This idea was not new because international humanitarian law and an array of treaties from the mid-1800s onwards already referred to obligations towards civilians during conflict, containing such ideas as proportionality, distinction, discrimination, military necessity and humane treatment.

The CMC effort has followed the precedent of the ICBL, struggling through the slow CCW process and challenging the stragglers. If cluster-munition campaigners were unprepared for the inadequacy of the prevention measures of the Convention's Protocol V[4] that were agreed to by governments, they have sober expectations about their


PHOTO COURTESY OF TITUS PEACHEY

Red spray paint warns villagers of a cluster bomb along a path in Ton Neua Village, Laos, 1994.

prospects now at the CCW. At a minimum, preventing UXO meant establishing acceptable failure rates, banning certain fusing configurations and destroying aging stockpiles. But no mandatory measures to prevent UXO (including cluster munitions) appeared in the final text. Instead, it stated, "Each High Contracting Party is **encouraged** to take generic preventive measures aimed at minimising the occurrence of explosive remnants of war" and "Each High Contracting Party may, on a **voluntary basis**, exchange information related to efforts to promote and establish best practices" (emphasis added).[4]

Protocol V is far off the mark, but campaigners continue to press governments to sign on as a first step to recognising a problem. Some nongovernmental organisations now mull over the idea of an "Ottawa Process" to deal with cluster munitions. While not discounting any future process outside the CCW, Human Rights Watch has called for a new protocol focussed on cluster munitions: "The mandate and the protocol should be broad, and should deal with both the technical reliability issues and the targeting and use issues. … [A] new protocol should prohibit the use of unreliable and inaccurate submunitions and require their destruction. The billions of unreliable and inaccurate submunitions already in the arsenals of more than 70 nations are the primary humanitarian concern. They must never be used in order to avoid a humanitarian and socioeconomic disaster exceeding that created by millions of landmines globally."[5]

Human Rights Watch, one of a handful of early adopters,[6] was willing to call for a moratorium on cluster munitions in 1999, and in 2003 it named a specific list of problematic cluster weapons that should not be used in Iraq because of their known hazardous failure rates.[7]

Explosive Remnants of War

Even before the Ottawa Convention was signed, deminers and mine-clearance and other organisations recognized as self-evident a danger from weapons with similar characteristics to anti-personnel mines. There came a proposal from the International Committee of the Red Cross that campaigners and governments should look at all explosive remnants of war, a grouping that initially included unexploded cluster munitions, anti-tank/anti-vehicle mines and APMs, anti-handling devices, artillery shells, bombs, grenades, booby traps and even missiles.[8]

Explosive remnants of war captured the boundaries of the contagion, but not all unexploded ordnance posed an equal risk. Some were more visible and more prevalent and others were less likely to explode inadvertently. Some had greater military utility, which made their prohibition more difficult. The *ERW* nomenclature has been a useful and creative approach to underlining similar humanitarian effects caused by a broad range of munitions. It resulted in a new CCW Protocol (Protocol V), but one with few obligations on member states. Governments eschewed specific preventive measures for fear that more of their arsenal would subsequently be scrutinised, restricted or prohibited. The United Kingdom, in its March 2005 presentation[9] to the ERW experts' working group, while defending the military utility of cluster weapons as an area-effect weapon, readily admitted current models were problematic. (They did not, however, commit to their immediate withdrawal.[10])

Unexploded cluster munitions litter grazing land in Xieng Khouang province, Laos, 1994.

A significant strike against cluster munitions is their rivalry with APMs for highest number of unintended victims. In parts of the world (Laos, for instance), the sheer number of failed cluster munitions poses a hazard as great as or greater than anti-personnel mines.[11] A 2002 survey by the Geneva International Centre for Humanitarian Demining found the "data available on the casualties of ERW and percentage of UXO cleared again shows a greater bias toward the two main groups—anti-personnel mines and cluster bomblets (submunitions). It is probably the case that they are responsible for most of the casualties in some post-conflict environments."[12]

By a process of elimination, then, the effort to address ERW has quickly come to focus primarily on one subgroup (aside from APMs) with the most serious humanitarian impact: cluster munitions.

Failure Rates

Cluster casualties were sometimes the consequence of munitions that erred from their target or that were dropped close to noncombatants—but it is their high failure-to-detonate rate that makes them potential ERW. Official failure rates of cluster munitions often varied from the numbers recorded in the real world. Rae McGrath reported in his resource book, *Landmines and Unexploded Ordnance*,[13] that the 1966 tests of BLU-26 submunitions at Nellis Air Force Base in ideal circumstances revealed a 26-percent failure-to-explode rate after deployment.

Colin King, an international landmine and explosive ordnance disposal consultant, pointed out, "Gulf War I clearly demonstrated a major discrepancy between performance during military 'acceptance tests' and operational use. …[N]early 2,000 electronic mines remained unexploded in the U.S. clearance sector alone, despite achieving near-perfect results during testing."[14]

Similarly, demining consultant Andy Smith notes, "Formal tests take place on hardpan and with the pilot able to deploy the CBU [cluster bomb unit] in the manner required by the manufacturer. Typically he will be flying at the correct speed, orientation and altitude to ensure optimum performance. In a combat situation, that same pilot may be operating at night and under enemy fire. The target area may include buildings or woodlands and the ground surface may vary from concrete to swamp. Submunitions may be dispersed at a height that does not allow them to complete the arming process before landing; they may strike trees or buildings that prevent them landing in the intended orientation. They may also land on a surface that swallows them up."[15]

Emergence of a Cluster Munitions Campaign

At the Lugano, Switzerland, conference of experts organised by the International Committee of the Red Cross in 1976, 13 states[16] concentrated on the lethal footprint of cluster munitions and the horrific consequences for civilians nearby. However, core cluster-bomb user-states did not sign onto the Lugano statement and there was no reference to detonation failure rates. The critical experience in Laos and Vietnam was that cluster bombs had been targeted at or near noncombatants.[17] Many of the deaths from UXO were yet to come. While the Lugano conference did not establish a cluster-bomb campaign, it (and the Lucerne conference) did lead, ultimately, to the creation of the CCW in 1980. Except through advocacy by the Mennonite Central Committee (with clearance work by Mines Advisory Group in Laos) and Human Rights Watch, the problem of cluster munitions might have fallen entirely out of sight. The campaign spark came somewhat later.

Ottawa Convention Impact

Thirty million submunitions were dropped in the 1991 Gulf War, resulting in thousands of untargeted victims—and yet there was no sustained public outcry. Cluster munitions casualties in Kosovo (1999) and Afghanistan (2001), however, did receive attention, as did munition failure rates (normally an esoteric subject area).[18] The news media were quick to highlight the similarity in appearance of cluster munitions and yellow food packages dropped into Afghanistan (a confusion that actually had rare, if any, consequences).[19] In Canada, where I live, members of Parliament had to respond to inquiries about cluster bombs in question period.[20] Government ministers were forced to make contradictory statements. The European Parliament, for its part, took a stand in favour of a moratorium. So what had changed since the Gulf War?

The link between renewed interest in cluster munitions and the international success of the APM ban campaign is unmistakable. The ICBL and Ottawa Convention had highlighted the unacceptability of weapons detonated by innocent victims either directly (death and injury) or indirectly (socioeconomically). All weapon use after the Ottawa Convention bears a new level of scrutiny.[21] For many campaigners, this was the best possible result.

The Pace Picks Up

At an International Committee of the Red Cross experts' meeting in Nyon, Switzerland, in September 2000, explosive remnants of war were officially put on the agenda. Colin King's breakthrough report, *Explosive Remnants of War: A Study of Submunitions and Other Unexploded Ordnance*,[22] was circulated. Nongovernmental organisations and governments met informally, and there was "widespread recognition"[23] of the ERW problem and a need to address it.

A BLU-26 cluster bomb peeks out of a rice paddy dike in Nanou Village, Laos, 2000.

In December 2001 at the final plenary review conference of the CCW, the ICBL issued its first clear statement in support of those calling for "a moratorium on the use, production and trade of cluster munitions."[24] This was a delicate moment for the ICBL, where many felt that their priority was completing work in progress on APMs. While the Mennonite Central Committee and Human Rights Watch had been publicly campaigning for a moratorium on cluster munitions (sometimes by themselves) for a couple of years, most other member groups were quiet.[25] There was some concern that formally linking a cluster-munitions initiative to the landmine campaign would threaten partner governments that had signed the AP Mine Ban Convention. Would linkage jeopardize universalising the Ottawa Convention? Some governments had to wonder if the campaign was now spilling over into non-APM weapons. Where would it stop?

The contrary argument, which was the one that eventually led to the ICBL's December 2001 statement,[26] was that the credibility of a campaign in pursuit of a norm against victim-activated weapons would be put in jeopardy without formally recognizing and condemning the cluster-munitions problem. The ICBL decided to encourage its "members and supporters to work to alleviate the humanitarian impact of cluster munitions and other explosive remnants of war."[26]

Recent Developments

Virgil Wiebe, a consultant to the Mennonite Central Committee and law professor at the University of St. Thomas, described a key presentation by the U.S. representative at the CCW in November 2005 as "a jaw-dropping moment." The official borrowed heavily from a recent task force report that had found no identifiable "comprehensive approach—empirical observation or otherwise—to determine and document

Near Erbil, Iraq: the CBU was released at too low an altitude and these BLU-97 submunitions hit the ground without arming. Their damaged state makes them unpredictable and very dangerous.

operational combat failure rates of U.S. munitions."[27] This is a remarkable admission because it has broader implications than just concerning cluster munitions. But consistent with nongovernmental organisation and field-based evidence, it also confirms actual CBU failure rates might have little relationship with official "test" claims.[28]

In March 2006, Timothy McCormack, a professor of international humanitarian law at the University of Melbourne Law School, led a review of the responses to a survey by CCW States Parties regarding their views of the relevance of IHL principles to explosive remnants of war. McCormack concluded that the CCW's Protocol V should be sufficient to address the problem of ERW—but if not, and the problem "only increases in severity," the call for a ban on cluster bombs should not be unexpected. Significantly, the report also argued that whatever the outcome, "**the onus is on user states** to demonstrate that such weapons can be used consistently with the binding obligations of IHL" (emphasis added).[29]

The announcement that the Belgian government had adopted a comprehensive ban on cluster munitions sent a ripple of optimism through the Cluster Munition Coalition, and thanks to good Belgian timing, it arrived just in advance of the CCW meeting of States Parties in March 2006. In one swoop, the Belgians have changed the complexion of the cluster munitions campaign. While they have set the bar high,[30] they have also reinforced the belief that an international ban on something, not just clean-up measures, is now possible. The final ban text has been adopted by both houses of parliament in Belgium as of this writing.

While the most comprehensive ban is in Belgium (Austria is entering a parliamentary debate on a clusters moratorium), several other states have made their reservations known: "Australia, Belgium, Canada, Denmark, France, Germany, Greece, Italy, the Netherlands, Norway,[31] Poland, Switzerland, the United Kingdom and the United States have plans to withdraw from service or have destroyed certain types of cluster munitions."[32] Germany and Belgium are considering a strategy of narrowing the definition of cluster munitions so that a ban excludes advanced models that are not expected to be problematic.[33] The United States is not Belgium, but even the U.S. military, having distributed its own task-force report in advance of the CCW, seems to be willing to consider major changes in its arsenal. For the first time in a long time, a significant international restriction on certain cluster munitions appears to be within reach.

Continuing Debates

From the start, many ICBL campaigners had difficulty condoning technical measures to address high cluster-munition failure rates. They campaigned against self-destruction, self-deactivation and self-neutralisation solutions for APMs and worry that supporting technical fixes now may compromise an absolutist principle defended earlier. However, what if major players refuse to join an all-out ban on cluster munitions, even if they support a comprehensive ban on anti-personnel mines?

Controversy also surrounds the debate over what an "acceptable" failure rate might look like. Less than 1-percent failure is a typical cut-off point, but is also arbitrary. A very small percentage of a very large number can still be a humanitarian disaster, albeit a much-reduced danger compared with that produced by a 10- to 30-percent failure rate.

Yet, there may be a harm-reduction imperative to prioritising destruction of certain more problematic "worst culprit" munitions, whatever the future holds for a complete ban. There is consensus within the CMC for a moratorium on use, production and trade of cluster munitions until their humanitarian problems have been resolved—but not everyone has been in favour of prioritising.[34] Does highlighting the bulk of the problem legitimate what remains? Some worry that humanitarian law will be ignored and they have suggested that cluster munitions might be used more indiscriminately if their failure rates are "fixed." Will militaries switch to other bombs, causing more casualties, if cluster munitions are banned entirely?[35]

An interesting reverse-onus framework outlined by Landmine Action (UK) and consistent with one of the conclusions of the McCormack report is that governments should recognise all cluster munitions are assumed prohibited unless users can "opt in" with a guarantee that a particular munition can be used safely.[36] Might that approach fit nicely with the destruction of legacy munitions with the highest failure rates?

A final point: If the failure rates of cluster munitions were reduced to nil or next to nil, would there remain a humanitarian problem on a scale sufficient to sustain a campaign for a comprehensive international ban?

See Endnotes," page 110

Robin Collins has been active in the APM campaign since 1996 and in the cluster munitions campaign since 2000. He represented the United Nations Association in Canada, and was Co-chair and Chair on Mine Action Canada's board for several years. Currently he is Council Chair of the World Federalist Movement–Canada.

Robin Collins
2068 Benjamin Avenue
Ottawa, ON K2A 1N9 / Canada
Tel: +1 613 759 4142
E-mail: Robinco@sympatico.ca

World Federalist Movement–Canada
207-145 Spruce Street
Ottawa, ON K1R 6P1 / Canada
Tel: +1 613 232 0647
Fax: +1 613 563 0017
Web site:
www.worldfederalistscanada.org/